UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ADMINISTRATIVE LAW JUDGE LAUREN ESPOSITO

McDONALD'S USA, LLC, A JOINT EMPLOYER,

et al.

and

FAST FOOD WORKERS COMMITTEE and
SERVICE EMPLOYEES INTERNATIONAL UNION,
CTW, CLC, et al.

Cases 02-CA-093893, et al.
04-CA-125567, et al.

CHARGING PARTIES' REPLY BRIEF IN OPPOSITION TO PROPOSED SETTLEMENT AGREEMENTS

1. The General Counsel and the Respondents Have Failed to Justify Disposing of This Case Through Informal, Site-by-Site Settlement Agreements.

While it is true that NLRB policy allows settlement at any stage of a ULP case, this does not mean that the same settlement is proper at every stage. To the contrary, the appropriate form, structure and substance of a settlement will vary depending on the nature and status of a given proceeding. Here, the General Counsel and the Respondents invoke the Board's general interest in encouraging voluntary dispute resolution. But they ignore the Board's strong, equally well established policy favoring *formal* settlements after issuance of complaint, *see* NLRB Statement of Procedures § 101.9(b)(1), particularly in circumstances involving multiple ULPs and repeat offenders. *See* Charging Parties' Opening Brief at 28-29. None of the submissions to date justifies disaggregating this solid "global" case–arising from coordinated, system-wide recidivist behavior – and rolling it back to a pre-complaint posture yielding 30 *informal*, site-by-site settlements.

As Charging Parties argued at the April 5 hearing and in our brief, the "recidivism" or "repeat-offender" analysis of these proposed settlements and remedies should comport with the policy reaffirmed by the General Counsel less than two months ago in GC Memorandum 18-03.

That policy rightly treats as “repeat offenders” those charged parties “found to have violated the Act *by a Regional office*” in the recent past – a “universe” that clearly describes the series of meritorious ULP charges underlying and contemporaneous with this litigation. *See* Charging Parties’ Brief at 28-29. The General Counsel’s only response to that argument is a *non sequitur*: he cites the recent (or impending) settlement of four meritorious ULP cases “outside this litigation” at other locations owned by organizations that are Respondents in this case. General Counsel’s Opening Brief (“GC Brief”) at 6-7. But those “four [other] cases” do not pretend to define the entire “universe” of repeat offenders among the McDonald’s ULP charges filed before and after the December 2014 complaints, only the last remnants to be resolved. *See* Charging Parties’ Brief at 29 and n.67.

Much more disturbing is the complete disregard of multiple-offenders charged *within the Consolidated Complaint itself*, as well as outside it. Thus, for example, the General Counsel fails to consider together the multiple locations operated by significant Respondent Organizations like Colley, Lofton, Bailey and Karavites, both within and outside this complaint, because for the first time in over three years of litigation he now considers them all “different franchisees” and “therefore different respondents.” GC Brief at 7. Even viewing each of the 30 locations as a “different” respondent, and looking “within this litigation” alone, the General Counsel fails to acknowledge that for purposes of his settlement stance at this post-complaint stage, nearly all of these respondents are serial offenders, implicated in multiple meritorious ULP charges. *See* GC Exhibits 1-6.

For its part, Respondent McDonald’s strains so hard to obscure its own involvement with the relevant universe of offenders and offenses that it now seeks to disclaim control over even the Corporate-owned and operated “McOpCo” store in this case. *See* McDonald’s Opening Brief at 21, n.15 (arguing that the three ULP cases against that McOpCo store, addressed in Settlement Ex. 26, have no bearing on McDonald's because "McDonald's Restaurants of Illinois, Inc….is a different entity from McDonald's USA"). It may well be that McDonald's of Illinois, as a wholly-owned subsidiary of McDonald's USA LLC, has an "entity" identity within McDonald's corporate structure. But Respondent McDonald's still owns and controls this restaurant, and is unquestionably the party responsible for its operation.

Notably, at the very outset of this trial McDonald's specifically addressed this McOpCo store (located at 2005 W. Chicago Avenue, Chicago, IL), acknowledged its ownership, and persuaded the ALJ of McDonald's "complete control" over all employment conditions at that location: "McDonald's has admitted that it exercises complete control over the operations and the terms and conditions of the employees, [sic] employment for the employees at the McDonald's of Illinois location that's discussed in the complaint." Tr. 65 (ALJ's March 30, 2015 Bench Ruling on Petitions to Revoke Subpoenas Issued to McDonald's of Illinois).[1] Record evidence presented over the ensuing three years of trial only confirmed that McDonald's USA is directly responsible for the management and operation of each of its McOpCo stores.[2]

In short, the proposed store-by-store informal settlements do not take account of the

[1] McDonald's counsel made those early admissions on the record at the March 30, 2015 hearing as well as in the underlying February 23, 2015 Petition to Revoke Subpoena *Duces Tecum* No. B-1-L48977 at 1 ("McDonald's Restaurants of Illinois, Inc….[is] a wholly-owned subsidiary of McDonald's USA, LLC") and Exhibit 32 (McDonald's attached letter to the General Counsel representing that "this restaurant is corporate owned"). *See also* McDonald's Petition to Revoke Subpoena *Duces Tecum* No. B-1-L39K3Z at 5 n.2 (arguing that it was "absurd[]," "incredibl[e]" and "bad faith" for the General Counsel to insist that subpoenaed documents were needed "to show the 'degree of control' exercised by McDonald's over its corporate owned and operated restaurants").

[2] In addition to the inexplicable claim that it does not control and operate its own Corporate store, McDonald's quotes two unrelated statements by counsel for the General Counsel, out of context, to pretend that it had no involvement in any of the ULPs encompassed by the Consolidated Complaint. *See* McDonald's Opening Brief at 25 and 28. But the evidence elicited at trial confirms McDonald's key role in the commission of the ULPs in this case: in addition to promulgating and imposing unlawful policies, McDonald's coordinated and directed its franchisees' response to the "Fight for Fifteen" movement, even instructing franchisees to break the law. *See* Charging Parties' Brief at 20-25. The cited remarks do not nullify the trial record, nor can they transform McDonald's into an innocent bystander for purposes of evaluating the proposed settlement under *Independent Stave* and *UPMC*.

system-wide recidivist conduct addressed in this case, as well as in the many other McDonald's ULP cases processed by the Agency during the past five years. The General Counsel has failed to provide a persuasive justification for departing from stated Agency policy and withdrawing all complaints here in exchange for 30 informal, limited and isolated undertakings.

2. Neither the Current Status nor the Potential Future Course of this Litigation Makes the 30 Proposed Settlement Agreements Categorically Reasonable.

While the settling parties insist on treating each of the 30 respondents in a vacuum, through informal settlements confined to a single location each, they conveniently invoke the "global" litigation burden to portray all the proposed settlements as categorically reasonable. Thus, their opening briefs cite every potential remaining phase of the originally consolidated proceeding, including the burdensome deferred objections process and the prospect of 150 or more days of ULP "merits" trials in the severed cases from Regions 13, 20, 25 and 31.[3] And the Respondents continue to exaggerate and mischaracterize the Charging Parties' narrow position urging completion and closing of the nearly finished New York trial record.[4] But these are red herrings.

First, the arguments about voluminous deferred objections and hundreds of additional trial days erroneously assume that the ALJ must make a blanket ruling approving or rejecting all 30 proposed settlements as a single package. In fact, none of the 30 individual settlement agreements provides that it is entered into contingent on the settlement agreement of any other franchisee respondent. Thus, the ALJ is not faced with an all-or-nothing, "settlement vs. no settlement" proposition. Rather, the ALJ must decide whether to approve proposed individual settlements *on their particular terms*. To be clear, the Charging Parties have not conceded, and

[3] *See, e.g.*, GC Brief at 14-15; McDonald's Brief at 7-8, 19-20; California Franchisees' Brief at 1-2.

[4] *See, e.g.*, McDonald's Brief at 30; Region 13 & 25 Franchisees' Brief at 1-2.

do not concede, that any of the proposed unilateral settlements warrants approval under the *Independent Stave* factors as articulated in *UPMC*, 365 NLRB No. 153 (Dec. 11, 2017). But for purposes of a cost-benefit or risk-reward analysis addressing the reasonableness of settlement at this particular stage of the litigation, the ALJ can see that the posture of the cases from Regions 2 and 4 (where the ULP merits were fully tried, and the joint-employer record nearly completed) differs materially from that of the severed ULP cases in Regions 13, 20, 25 and 31. What may be reasonable with respect to one settlement does not dictate what is reasonable for another. Accordingly, the ALJ evaluates each of the proposed settlements on its own merits under the *Independent Stave/UPMC* analysis.[5]

In this regard, the ALJ should reject the General Counsel's claim that he retains unreviewable "discretion" as to settlement of the Severed Cases because the ULP "merits" trial of those cases has not yet begun.[6] Under the NLRB's Rules and Procedures defining who approves a post-complaint settlement—the Regional Director or presiding ALJ—the hearing (including presentation of evidence) did formally begin before ALJ Esposito in all these consolidated cases. *See* NLRB Rules and Regulations §§ 102.18, 102.51; NLRB Statements of Procedure § 101.9. The subsequent handling of ULP "merits" and joint employer segments under

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[5] The same nuanced approach informed the Charging Parties' position as to "finishing the trial" and "closing the record." We did not and do not contend that the ALJ must defer approval of any and all settlements until trial of all the Regions 13, 20, 25 and 31 ULP "merits" cases has been completed. Rather, Charging Parties argued only that the nearly finished New York trial could and should be concluded efficiently (given the ample opportunity provided for one or two remaining McDonald's defense witnesses and the General Counsel's one rebuttal exhibit) and the evidentiary record closed. Since each of the 30 proposed settlement agreements theoretically stands for evaluation based on its relevant stage of trial and the pertinent trial record, and given that a full record appeared realistic at least with respect to the Regions 2 and 4 cases, Charging Parties urged completing the record there in the interest of achieving clarity and closure for review of those proposed settlement agreements.

[6] *See* GC Brief at 4-5 (recognizing that formal "hearing" has arguably begun in the Severed Cases "given that joint employer evidence regarding those respondents has been presented;" but further asserting that without presentation of a ULP merits case there is no "basis on which to fashion remedies," making "the posture of those cases appear[ ] prosecutorial, not adjudicatory," so that "how to resolve them may remain within the General Counsel's discretion").

the Case Management Order did not change that fact, nor did the further severance protocol agreed upon in 2016. Moreover, the General Counsel in fact presented ULP evidence pertaining to the merits of Severed Cases, including witness testimony and documentary evidence elicited from McDonald's regarding McDonald's prescribed notices and policies and its national, system-wide response to "Fight for Fifteen" activity (which McDonald's also characterizes as its "brand defense"). *See, e.g.*, Charging Parties' Brief at 20-25.

In any event, the General Counsel's argument that he retains exclusive mid-trial settlement discretion where there is "no basis for fashioning remedies" is wholly irrelevant here. The General Counsel did not in fact exercise any "discretion" to customize settlements and remedies for those ULPs he fully litigated (Regions 2 and 4) as opposed to ULPs that require further evidence (Regions 13, 25, 20 and 31). Rather, as the Charging Parties demonstrated in their opening brief, the General Counsel has accepted the same inadequate, cookie-cutter settlement agreements and remedial terms across the board, regardless of the particular nature of the ULPs involved in a given settlement, and without regard to the individual franchisee's recidivism, scope of operations, or whether the ULPs were fully litigated. It remains within the ALJ's authority to evaluate each of the proposed settlement agreements on its own merits.[7]

3. McDonald's Asserted "Skin in the Game" is a Charade.

The proposed settlement agreements simply do not support the claim that McDonald's

[7] The ALJ should also reject McDonald's attempt to deflect all responsibility for the size and scope of this litigation by blaming the Charging Parties for filing (and the General Counsel for consolidating) many charges in multiple NLRB Regions in response to the numerous ULPs committed at dozens of McDonald's restaurants throughout the country. In its latest remark on the topic, McDonald's complains that the Charging Parties "drew various Regional Directors into this matter." McDonald's Brief at 29-30. It is true that the Charging Parties filed ULP charges in those instances where they concluded that McDonald's violated the Act through its coordinated national response to workers' protected Section 7 activity. But it is ludicrous to suggest that Charging Parties and the General Counsel had a duty to ignore violations of the law just because they were committed on such a grand scale by a business with a national footprint.

has meaningful remedial obligations or "skin in the game." As Charging Parties have previously shown, McDonald's only undertaking is to "support" the remedial obligations of the franchisees, and to do so in only two limited ways: (1) facilitate delivery of the franchisees' own money to a Settlement Fund, and (2) mail an inadequate short-form notice hedged in legal disclaimers to a narrowed set of recipients currently employed by the defaulting franchisee. *See* Charging Parties' Brief at 34.

The General Counsel's and McDonald's own submissions only perpetuate and exacerbate the confusion over the "Settlement Fund" and McDonald's role. According to the General Counsel, "[t]he settlement agreements impose the responsibility for the fund on McDonald's. McDonald's was obligated to collect and deliver the $250,000 being placed in the fund and has the responsibility for deciding whether and when to trigger any disbursement from the fund." *See* GC Brief at 9 n.23 (citing to "Settlement Fund" section in Settlement Ex.1). But McDonald's itself has expressly denied and refuted those misleading representations about its role in the Settlement Fund: its counsel clearly stated on the record that McDonald's has no role, *see* Charging Parties' Brief at 34 n.69, and McDonald's subsequent brief confirms the minimal extent of its undertaking to "support the remedies." *See* McDonald's Brief at 11.

Second, the settling parties' submissions do not refute our showing that McDonald's "Special Notice" is wholly inadequate. *See* Charging Parties' Brief at 34, 38-39. Any claim that this short-form, limited-distribution notice adds a meaningful remedy rings especially hollow with respect to those Respondent restaurants that have been sold or are no longer in operation. Unfortunately, the most likely candidates for default in this settlement scheme are franchisee Respondents that are no longer operating the McDonald's restaurants where ULPs took place. And it is clear that at one such store, 351 Fifth Avenue in New York, McDonald's has zero "skin in the game." *See* Settlement Ex. 12. There, the only franchisee remedy in the proposed settlement agreement is a one-time notice mailing to those former "Mic-Eastchester LLC" employees who were employed at the store from March 2, 2013 to June 1, 2013. The settlement requires no notice posting in the store, apparently because there is no longer a McDonald's store at that location.[8] *See id.* Given that McDonald's Special Notice is mailed only to *current* employees, and there are none, McDonald's will do absolutely nothing to remedy a default by Respondent Mic-Eastchester.

McDonald's "skin in the game" with respect to seven of the remaining 29 proposed settlement agreements is just as illusory. In each of those instances, the particular Respondent executing a settlement agreement has already sold the store and no longer has the ability to post the long-form, in-store Notices (which creates a default situation), nor does it have the ability to provide McDonald's with the names of the *current* employees of the store for purposes of mailing them the abridged "Special Notice."[9]

For example, it is Charging Parties' understanding that the Respondent identified as Wright Management (Settlement Ex. 17) is no longer in existence, having sold the store located at 600 N. Clark Street in Chicago to the Respondent Karavites organization. Absent a true remedial guarantee from McDonald's, there is no way to effectuate a remedy for the employees affected by ULPs committed at 600 N. Clark Street should Wright Management default on its sole remedial obligation under the agreement, which is to mail notice to its *former* employees. Settlement Exhibit 17 obligates the "Charged Franchisee" (explicitly defined as "Wright Management, Inc.") to provide McDonald's with the names and addresses of the "current

[8] The New York Franchisees assert, without further specification, that "the Settlement requires posting Notices in *all nine charged New York stores remaining in operation*." New York Franchisees' Brief at 6 (emphasis added).

[9] We previously noted reported changes in ownership at five New York locations (Settlement Exs. 2, 5, 6, 7, 8) and one California location (Settlement Ex. 28). *See* Charging Parties' Brief at 36 n. 70. On information and belief, an additional post-complaint change in ownership occurred in Chicago, at 600 N. Clark Street (Settlement Ex. 17).

employees employed by the Charged Franchisee," so that in the event of default McDonald's can send them its deficient Special Notice. But the "Charged Franchisee," Wright Management, presumably has no "current employees" to whom McDonald's would send that Special Notice. And even assuming, hypothetically, that the settlement agreement's terms obligated Wright Management to provide McDonald's the names and addresses of those individuals currently employed by *some other* owner operating the store at 600 N. Clark Street (a hypothetical that is not true in this case), there is no reason to believe Wright Management would have the ability to provide that information. Certainly, nothing in Settlement Exhibit 17 obligates the current operator to post the full in-store Notice or to give McDonald's the names and addresses of its own current employees for purposes of a Special Notice. Should McDonald's nonetheless obtain the names and addresses of current 600 N. Clark employees, it is not evident what purposes would be served by the Special Notice advising them that "Wright Management" violated the NLRA and defaulted on its settlement agreement.

In short, the absence of McDonald's as a guarantor of the settlement, and/or a party obligated to issue a full and accurate Notice to current and former employees, produces absurd results. For those stores where a change of ownership has occurred, under the best-case scenario some employees (most likely only former employees) will see a notice stating that their former employer (which in some instances may be a defunct organization) will not commit further violations of the Act—if such notice is posted or sent at all. If there is a default, then an abridged Special Notice might theoretically come from McDonald's to some employees, but this is unlikely given that McDonald's notice mailing obligation extends only to *current* employees of the narrowly defined, site-specific "Charged Franchisee" (an entity that by definition no longer exists after relinquishing that location). And if anyone did receive that Special Notice, it would tell them that some named entity (a stranger no longer operating at that location) violated the law in some unspecified manner, but that McDonald's did not. In the case of Respondent Mic-Eastchester, it is certain that a settlement default will result in no remedial notice being received by any employee, whether current or former.

The General Counsel obviously capitulated to McDonald's "predictabl[e] resist[ance]" to being labeled a "guarantor," even for settlement purposes only and without any joint employer admission. He now attempts to distinguish the shoddy result from UPMC's wholesale guarantee by suggesting that McDonald's undertakings here are somehow more "certain" than the "undefined 'guarantor' obligations of UPMC," which the General Counsel says "leav[e] no doubt as to what must happen if [McDonald's obligations] are triggered." *See* GC Brief at 11-12. Any argument characterizing the instant settlement as a "better outcome" than the true and full "guarantee" UPMC provided is wholly unfounded.[10] *See id.* at 12. UPMC did not "acknowledge" (nor did it have to acknowledge) any "authority to effectuate" its guarantee. A "guarantor" or surety need not have any legal "authority" or coercive power over the primarily liable party (the person or entity whose obligation is being guaranteed); rather, the guarantor must subject itself to an independent, secondary obligation (and, presumably, show sufficient assets to demonstrate that it is not judgment proof). Whether guaranteeing a loan or a lease, or in UPMC's case the back pay and notice remedies that might be ordered by the Board, a guarantor undertakes an enforceable duty to step in and fulfill specified obligations if the primarily responsible party defaults. McDonald's could certainly do that even absent the legal status of a joint employer or a parent corporation.

[10] The obligations undertaken by UPMC were not "undefined" or "uncertain" in any sense that undercuts their legal value. Rather, they were the optimal form of guarantee: an unqualified blanket guarantee, with no maximum limit, in the form of an immediately binding independent order. Here, whatever is required of McDonald's may be "explicitly defined." But that is precisely the problem: what McDonald's would have to do is, essentially, *nothing*.

4. The General Counsel Has Failed to Address the Deficiencies in the Remedial Notice Provisions of the 30 Proposed Settlements.

The deficiencies Charging Parties identified in the notice posting provisions of the 30 proposed settlement agreements remain unanswered by the General Counsel and Respondents. The most obvious deficiency is the lack of any assurance that the detailed long-form Notices will actually be posted and distributed as prescribed. The record evidence is clear that McDonald's *requires* every single one of its U.S. stores to post what it calls a "9-in-1 poster," which includes a clear and direct "NO SOLICITATION POLICY" under McDonald's Golden Arches symbol, and which lacks any disclaimer identifying it as merely the independent policy of a particular franchisee. *See* Tr. 1648 and 1654; GC Ex. HR029 (9-in-1 Federal Law Poster) MCDNLRB18840029.[11] The joint employer record in this case underscores this fundamental premise—McDonald's mandates uniformity and compliance when it wants to do so. It strains credulity to suggest that McDonald's could not, at a bare minimum, guarantee that the "robust" remedial Notices of which it boasts are actually disseminated.

The General Counsel nonetheless insists that the settlements adequately "vindicate workers' Section 7 rights by providing make-whole remedies for workers who, in his view, were *unlawfully discriminated against* and by requiring that Respondents, *including McDonald's if*

[11] The 9-in-1 poster is a collection of nine required postings grouped together in one large poster hung in every break room in every McDonald's restaurant. The poster includes a reprint of six federal workplace postings: (1) Equal Employment Opportunity is The Law from the U.S. Equal Employment Opportunity Commission; (2) Employee Rights Under the Fair Labor Standards Act from the U.S. Department of Labor ("DOL"); (3) Employment Rights and Responsibilities Under the Family Medical Leave Act from the DOL (4) Notice: Employee Polygraph Protection Act from the DOL; (5) Your Rights Under USERRA from the DOL; (6) Job Safety and Health It's the Law from the DOL. The remaining three items on the 9-in-1 poster are: (1) "Who to Contact if You have Any Employment-Related Concerns" which provides a blank space for the franchisee to insert the name and phone number of the individual employees should contact with their workplace concerns; (2) "Summary of This McDonald's Franchisee's Policy Against Discrimination and Harassment for Restaurant Employees"; and (3) "No Solicitation Policy." The "No-Solicitation Policy" stands in contrast to the "Summary of This McDonald's Franchisee's Policy Against Discrimination and Harassment for Restaurant Employees," with the latter indicating that the non-discrimination policy belongs to the particular franchisee (notwithstanding the obvious fact that the same non-discrimination policy must be posted as part of the 9-in-1 poster in every McDonald's restaurant break room). McDonald's does not even attempt to disclaim the "No-Solicitation Policy" as its own, instead printing it directly under the only image of McDonald's iconic Golden Arches to appear anywhere on the poster.

necessary, inform employees of those rights while disavowing their violation." GC Brief at 3 (emphasis added). But this assertion ignores the reality that only some of the ULPs in the consolidated joint employer test case involved "discrimination," with only a handful of the affected workers being 8(a)(3) "discriminatees." Rather, most of the violations involved threats, coercion and restraint, and those 8(a)(1) violations (which took place from top to bottom of the franchisor-franchisee network) had the most widespread and systematic impact on employees' concerted activity and their exercise of NLRA rights. As we further demonstrated in our opening brief, the "McDonald's if necessary" component of the settlements clearly does not "*inform employees of those rights while disavowing their violation"* in the manner and to the extent that should be, or is, required of the other respondents. *See* Charging Parties' Brief at 34, 38-39.

Equally untenable is the General Counsel's argument that McDonald's was in no position to provide any stronger "support" for the 30 proposed settlement agreements than what we see here—never mind a true guarantee—because McDonald's could not offer reinstatement opportunities for discriminatees fired in violation of 8(a)(3). GC Brief at 12-13. But reinstatement capacity is a moot issue, and largely beside the point here, for this consolidated test case encompassed only three outright terminations for union activity. Moreover, at the time the settlements were presented to the ALJ for approval, those three individuals had reportedly waived their right to reinstatement in return for a monetary premium. And it remains the case that McDonald's (or any financially sound entity) could easily "guarantee" that form of pay-in-lieu remedy without acknowledging any authority to compel specific performance. In the end, raising the weak excuse of inability-to-reinstate only highlights the General Counsel's failure to achieve more comprehensive impact, through guaranteed performance of the much more prevalent Notice remedies.

The General Counsel accurately predicted that Charging Parties would fault the proposed settlements for including non-admissions clauses in the already deficient “Special Notice.” We stand on that objection, for the reasons set forth in our opening brief. The General Counsel has only reinforced our objection by offering an obviously flawed rationale for agreeing to the improper non-admissions notice: since “the Notice opens by attributing blame for the ULP to the franchisee, and ends with McDonald’s’ condemnation of that ULP,” affected employees “should not be confused by the Notice or by the wrongs it attempts to correct.” GC Brief at 9, n. 22. As explained above, *supra* at 7-10, in situations where the store has changed ownership or closed, any employees who receive the Special Notice will undoubtedly be “confused” as to what, specifically, McDonald’s is telling them.

Indeed, everything the General Counsel says in an attempt to dismiss the problematic disclaimer/non-admission language in the Special Notice is meaningless, because the settlements do not ensure that the Respondents’ detailed long-form Notices will actually be posted and mailed. Standing alone, as a remedy, a Special Notice from McDonald’s says only that employees have NLRA rights, prefaced by opaque and confusing legal qualifications and disclaimers. None of the Special Notices clearly tells the employees *what ULP’s* are “attributed” to the franchisee and *what ULP’s* McDonald’s is “condemning.” By contrast, as illustrated in the 9-in-1 poster, when McDonald’s wants employees to understand something such as its uniform, nationwide “No-Solicitation Policy,” McDonald’s communicates its instructions in clear and direct language, and without the need to add any caveats or disclaimers attributing the policy to the employee’s franchise operator. *See supra* at 11 n.11.

5. The General Counsel Failed to Investigate and Obtain the Evidence Needed to Determine Whether the 30 Proposed Settlements Should Include Electronic Notice.

As Charging Parties previously demonstrated, it is the General Counsel’s affirmative duty to investigate and obtain relevant information about the settling Respondents' *current* electronic communications systems and practices, as of the time of the contemplated remedial notice-posting. *See* Charging Parties' Brief at 36-37 (citing NLRB Case Handling Manual and directive OM 12-57). Notably, this duty applies to any ULP settlement undertaking, even in the pre-trial context where no evidentiary "record" exists. Yet here, instead of investigating and assessing the current status of the 30 Respondents' electronic communications, the General Counsel passively invokes the absence of pertinent information in a trial record confined to historical facts dating back four to six years. *See* GC Brief at 6 ("Here, the record evidence showed that neither McDonald's nor the franchisee respondents customarily communicated with employees electronically. . . . Given these considerations, the General Counsel concluded that requiring a physical posting in a conspicuous place inside the restaurants, along with mailed notices to former employees, was the most effective way to share the notices with employees.").

The trial record here was limited to the 2012-14 period and did not address *current* communication systems and practices, whether with McDonald's corporate organization or within each of the 30 named franchisees. Moreover, when the General Counsel was presenting his joint-employer case he did not purport to investigate and establish, for remedial notice purposes, how each of the 30 named franchisees customarily communicated with their employees even during that historical period. We do not know whether and how the Respondents may differ today in the nature, scope and utilization of email, internet and other electronic communications systems. But the lack of current, pertinent information undermines rather than supports the General Counsel's limited notice remedies.

The General Counsel's "most effective way" argument is equally unsound. The Agency's current approach under *J. Picini Flooring* does not entail an either/or choice, *i.e.*, either electronic dissemination or physical posting and standard mailing. Rather, simply because one means of dissemination is viewed as "the most effective" or "more effective" than other feasible means does not mean that all of them should not take place concurrently. Here, again, the obvious deficiencies have not been and cannot be explained away.

6. Charging Parties did not "Refuse" to Participate in Settlement Discussions.

McDonald's was not party to the sporadic communications from the General Counsel to the Charging Parties during the time period when the General Counsel was apparently engaged in his global settlement talks with McDonald's. Yet McDonald's invents facts not presented on the record, and distorts the record transcript itself, to criticize the Charging Parties for "refusing" to take part in settlement negotiations. While we deny that accusation, it is also beside the point: McDonald's allegations do not enhance the proposed settlements, nor do they refute our objections to the settlements' deficiencies.

For example, McDonald's asserts that Charging Parties were "fully apprised of the discussions" between McDonalds, Charged Franchisees and the General Counsel and "refused to participate." *See* McDonald's Brief at 8 (citing Tr. 21201:21-23). Not only does that misstate what was said at the March 19 hearing, it is simply not true. Counsel for Charging Parties stated on March 19 that "we were generally advised for probably 50 of the 60 days" that negotiations were taking place between McDonalds and the General Counsel. Tr. 21201. But it was never clear to Charging Parties until the final days leading up to the planned resumption of trial on March 19 that a settlement would even be reached, nor were Charging Parties provided with full information on what was transpiring between McDonald's and the General Counsel.[12] Moreover,

[12] McDonald's also takes liberties with citation to the record at Tr. 21202:10 by insinuating that Counsel for the Charting Parties refused even to open settlement documents. *See* McDonald's Brief at 12-13. A full reading of that portion of the transcript makes clear that Charging Party counsel was describing what occurred ten days prior to the scheduled resumption of trial, when he was notified, four hours after receiving back-pay calculations, that settlement

the General Counsel's own statements directly contradict McDonald's allegations that Charging Parties have categorically refused to participate in the settlement process. Counsel for the General Counsel confirms that he continues to be in dialogue with the Charging Parties concerning the methodology for computing back pay at the Sanders-Clark location. *See* GC Brief at 6 (citing to Tr. 21240:18-22 wherein the General Counsel acknowledged revising back pay figures following new information supplied by Charging Parties).

7. Contrary to McDonald's Arguments, There is No Established "Franchise Exception" or "Brand Protection" Defense Under the NLRA

McDonald's mistakenly claims that settled Board precedent makes NLRA joint employer principles inapplicable to franchisor-franchisee relationships. *See* McDonald's Brief at 4 n.6 and Exhibit 1. In fact, the Board has only rarely had the occasion to address joint employer allegations in the franchisor-franchisee context, and the most recent of the so-called "franchise trilogy" decisions—*Love's Barbeque Restaurant*, 245 NLRB 78 (1979) —dates from 40 years ago.[13]

As demonstrated below, none of those old Board cases involved highly sophisticated, comprehensive business-format franchising arrangements comparable to the "McDonald's System" at issue in the present ULP proceedings. And, most significantly, none of the decisions purported to carve out a special "franchise exception" to the generally applicable legal principles and precedent governing joint employer determinations under the NLRA. To the contrary, as the Board recently emphasized, traditional NLRA precedent maintained "a unitary joint-employer test" that applied to *all* types of business relationships among employers, without distinction. *Hy-*

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negotiations over those back pay figures were concluded, that 8(a)(3) discriminatees were contacted without the Charging Parties' involvement, and that waivers of reinstatement were secured. In sum, on that particular occasion he did not have the opportunity to open the documents before being notified that settlement discussions with the franchisees were completed.

[13] In addition to *Love's Barbeque*, that trilogy comprises *Tilden, S. G., Inc.*, 172 NLRB 752 (1968), and *Speedee 7-Eleven*, 170 NLRB 1332 (1968).

Brand Indus. Contractors, 365 NLRB No. 156 (Dec. 14, 2017), slip. op. at 12 n.41. Indeed, any suggestion that the test varied depending on the type of relationship or industry setting "was unprecedented and certainly had no foundation in the common law." *Id.*

Equally important, none of the Board's joint employer precedent to date has squarely addressed, or even considered, the legal underpinnings of what seemed to be McDonald's principal defense in this proceeding, "brand protection." That defense invokes the (purported) relationship between federal trademark law governing registration, licensing and maintenance of a commercial "brand" (whether in a franchising or other business context), and the brand-owner's involvement in sharing or codetermining its licensee's employment conditions and labor relations policies. As demonstrated below, McDonald's cannot begin to substantiate its apparent claim that whatever it does in the way of sharing and co-determining franchisee employment conditions and labor relations policy is no more than what trademark law requires of it to avoid abandonment of the licensed "McDonald's" brand. More generally, no holding embraces the novel proposition that, when determining whether an employer (or co-employer)-employee relationship exists, the Board is barred from taking into account any control a business owner exercises over working conditions or labor relations for the purpose of "protecting," "defending" and/or enhancing its commercial "brand."

a. The Board's old "franchise trilogy" applies fact-intensive joint employment analysis to much less sophisticated and less comprehensive franchising arrangements than the McDonald's System at issue in this case

The *Hy-Brand* Board cited *Love's Barbeque*, *Tilden,* and *Speedee 7-Eleven* for the proposition that it "has generally not held franchisors to be joint employers with their franchisees . . . ." *Hy-Brand,* slip op. at 27. While that statement reflects the outcomes of those cases, each decision was reached through a fact-intensive examination of whatever evidence the parties elicited regarding the franchisor's control over terms and conditions of employment.[14] And, in each instance, record evidence of control was relatively minimal compared to the extensive and sophisticated "McDonald's System" for managing franchise restaurants.

In *Speedee 7-Eleven*, the Board began its joint employer inquiry by stating that "the critical factor in determining whether a joint employer relationship exists is the control which one party exercises over the labor relations policy of the other." *Speedee 7-Eleven*, 170 NLRB at 1334. It went on to find that "[t]here is no evidence that the clear language . . . of the franchise agreement granting complete control over store labor relations to the franchisee has ever been disregarded by the parties or that Southland [the franchisor] has ever sought to interpret the agreement in such a way as to vest in itself *the right to influence* George's [the franchisee's] labor relations policies." *Id* (emphasis added).

Moreover, the Board in *Speedee* found "the record reveals that most franchisees, including George, maintain a rather casual attitude toward the [policy] manual and refer to it only infrequently. Nor is there any evidence that Southland has sought to secure compliance with the manual recommendations or that it considers its terms to be more than recommendatory." *Id.* This stands in marked contrast to the practices in McDonald's outlets as described in Charging Parties' opening brief at 13-25.

Similarly, in *Tilden*, the Board again focused on control over labor relations, not brand protection, concluding that although "many elements of the business relationship . . . are regulated by the franchise agreement, we find no clear indication, nor can we so infer from the provisions of the [franchise] agreement itself, that Respondent Tilden [franchisor] intended to, or

[14] Each of those three cases was decided before the familiar *NLRB v. Browning-Ferris* formulation (*e.g.*, two independent employers who "*share or co-determine*" matters governing essential terms and conditions of employment), now accepted as describing the traditional Board test for joint employer status. *See Hy-Brand*, 365 NLRB No. 156, slip op. at 5-6 (citing *NLRB v. Browning-Ferris*, 691 F.2d at 1124).

in fact did, exercise direct control over the labor relations of Bayshore and Huntington [franchisees].” *Tilden*, 172 NLRB at 753. The Board reached this conclusion by analyzing regulated elements of the business relationship with a potential impact on labor relations, such as pricing and housekeeping standards, offered trainings, and requirements regarding uniforms and hours of operation. *Id.* For each element analyzed, however, the Board found the relevant control to be lacking. Specifically, the Board did not note any connection between housekeeping standards and job duties; found that the franchisor’s mere offer to train prospective employees did not constitute an exercise of authority over hiring; and found that the franchisor’s requirements as to operating hours did not affect employee terms and conditions of employment because they “in no way prescribe[] the hours that a particular employee must work . . . .” *Id.* In short, as in *Speedee 7-Eleven*, the Board found nothing like McDonald’s involvement in employment and labor relations matters such as hiring, job duties, training, work rules, and labor relations policy regarding employee union and concerted activity.

Finally, in *Love’s Barbeque*, as in *Speedee 7-Eleven* and *Tilden*, the ALJ began his joint employer analysis by explaining that “the true issue presented here is whether . . . the degree of control retained by Respondent Love’s [franchisor] confers sufficient authority over a significant segment of Respondent Kallmann’s [franchisee’s] labor relations to warrant finding that Respondent Love’s continues to be an employer of Respondent Kallmann’s employees.” *Love’s*, 245 NLRB at 119. He went on to find, among other things, that the franchisee “alone and exclusively hires, fires, and in every other respect sets the terms and conditions of employment of the [restaurants] employees” (quoting *Speedee 7-Eleven* at 1334); that the policies and procedures set forth in the franchisor’s operating manual were not communicated directly with the franchisee’s employees; that only certain initial employees were given “craft books” adapted from the operating manual, that later employees did not receive such books, and that the employees who did receive them were instructed by the franchisee to “take them with a grain of salt”; that the only parts of the operating manual that were truly mandatory were the portions relating to product specifications, recipes, and portions and sizing; and that the franchisor had “no control over the caliber of service provided by [franchisee’s] employees.” *Id.* at 120.

In sum, none of these “franchise trilogy” cases addresses comprehensive hiring, training, and operating procedures that are essential to the McDonald’s System. And, as demonstrated further below, none of these cases pretends to create anything like a “franchise exception” or “brand protection” defense that would exclude such factors from consideration under the traditional joint employer analysis.

For these reasons alone, a significant public interest in pursuing this litigation outweighs the interest in settling on the terms presented here. All interested parties would benefit from the ALJ and the Board revisiting these 40- and 50-year-old decisions in the context of modern franchising arrangements, based on an adequate, fully litigated factual record. At the same time, completion of the New York trial record and presentation of that case for decision would enable the Board to decide, for the first time, on a concrete record, the factual and legal issues presented by McDonald’s unprecedented “brand protection” defense —a theory that is foreign not only to existing Board law, but also to the trademark law on which it supposedly rests.

b. McDonald’s “brand protection” defense to joint employer liability is not clearly established under existing Board law.

None of the three franchise joint employer decisions discussed above was based on—or clearly establishes—a “franchise exception” that would effectively exempt brand protection activities from generally applicable joint employment principles. In *Speedee 7-Eleven*, for example, the Board’s joint employer analysis contained no discussion of franchisor brand protection, much less any analysis of how any such brand protection activities might intersect with control over labor relations. *See Speedee 7-Eleven*, 170 NLRB at 1334.

Similarly, in *Tilden*, although the Board did make passing reference to what could generally be described as brand standards, those observations did not form the basis of its legal analysis. As explained above, what drove the Board's finding of no joint employment relationship was not the existence of a brand-related purpose or intent for particular standards, but that *none of these standards or mechanisms effectuated control over job duties or other labor relations matters*. *See supra* at 18-19.

Given the lack of a "brand protection" exception in *Speedee 7-Eleven* and *Tilden*, McDonald's defense in this proceeding appears to rest in large part on *Love's Barbeque*. The problem, however, is that it would require a significant distortion of the language and reasoning of *Love's Barbeque* to derive from that case any categorical "franchise exception" or "brand protection" defense as suggested by McDonald's.

The *Love's Barbeque* language on which McDonald's bases its defense derives from the ALJ's rephrasing of the joint employer analysis to explain that the franchisor and its franchisee would not be deemed joint employers where the record met *two essential conditions*. Specifically, the ALJ framed the question as "whether a preponderance of the evidence shows no more than" the following: "[1] control retained by Respondent [franchisor] Love's has no direct affect [sic] on Respondent [franchisee] Kallmann's labor relations *and* [2] has been retained solely in an effort to maintain the uniformity of the integrated enterprise." *Love's*, 245 NLRB at 119 (emphasis added). As applied to McDonald's defense, this would require proof not only that the McDonald's System has been promulgated and maintained "solely in an effort to maintain the uniformity of the integrated [McDonald's] enterprise," but *also that* the retained control, standards and requirements constituting the McDonald's System have "no direct [e]ffect on Respondent [franchisees'] labor relations."

But, here, McDonald's apparently proposes an entirely different test. As McDonald would have it: (1) even if the record shows that the retained control, standards and requirements of the McDonald's System do have a direct effect on employment conditions and labor relations at franchisee restaurants, (2) the ALJ and the Board must nonetheless disregard anything that was done for the purpose of protecting and maintaining the McDonald's brand.

Of course, the Board needs a completed trial record in the pending case to make a rational determination regarding the validity and import of McDonald's brand-related defense arguments under existing Board precedent. And the same would be true if the Board were open to forging new law in this area. The recent and short-lived *Hy-Brand* decision, a compendium of policy arguments, hypotheticals and frequently confusing *dicta*, sheds little if any light on how NLRA joint employer law applies to business-format franchising arrangements like McDonald's. Only a concrete, fact-based decision reached in the ordinary course of litigation, on a relevant and well-developed record, will provide meaningful guidance.

c. Trademark law fails to support McDonald's "brand protection" defense.

McDonald's "brand protection" theory seems to rest in part on the rationale (addressed in *dicta* in *Hy-Brand*) that most if not all of its actions as Franchisor should not factor into the joint employer analysis because they were required by laws other than the NLRA. In particular, McDonald's apparently posits that any aspects of shared control/codetermination established in this case were necessary to protect against "abandonment" of its trademark(s) through so-called "naked licensing"—*i.e.*, allowing its franchisees to use McDonald's marks without sufficient quality controls to ensure that the public is not deceived as to the quality of products sporting the McDonald's brand. *See Hy-Brand*, 365 NLRB No. 156, slip op. at 28. The trademark cases cited in *Hy-Brand*, however, shed little light on how much control is actually required to protect one's trademarks.[15] Further, none of these cases addresses how any such required actions should be judged when they intersect with other laws.

Regarding the extent of control required for trademark preservation, there is simply no authority to support McDonald's notion that every aspect of its operations is necessary to protect its trademarks, much less that the entire McDonald's System should be shielded from generally applicable NLRA principles. Although a detailed presentation of trademark law and franchising is beyond the scope of this Reply brief, the import of the "naked licensing"/abandonment of trademark cases can be summarized succinctly: all that is required is control over the quality of the *end product* sufficient to avoid customer confusion. *See* 1 Gladys Glickman, *Franchising* § 3A.02[4][a] (franchisor "must retain sufficient control over the licensees' dealing in the end product to insure that they will apply the mark to either the same product or to one of substantially the same quality with which the public in the past has associated the product."). In practical terms, McDonald's cannot plausibly pretend that it would risk an "abandonment" claim (*e.g.*, by an unauthorized competitor selling knock-off "Big Macs" under a "Golden Arches" logo) if it allowed its franchisees to sell genuine Big Macs, produced according to McDonald's recipes, in McDonald's restaurants, staffed by employees who failed to smile or who departed from McDonald's crew staffing, positioning, or service time requirements.[16]

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[15] *See, e.g., Barcamerica Int'l USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589 (9th Cir. 2002) ("Certainly, 'it is difficult, if not impossible to define in the abstract exactly how much control and inspection is needed to satisfy the requirement of quality control over trademark licensees.' *McCarthy on Trademarks and Unfair Competition*, § 18:55, at 18–94 (4th ed. 2001). And we recognize that 'the standard of quality control and the degree of necessary inspection and policing by the licensor will vary with the wide range of licensing situations in use in the modern marketplace.' *Id.*, at 18–95.").

[16] *Compare, e.g., FreecycleSunnyvale v. Freecycle Network*, 626 F.3d 509, 516-18 (9th Cir. 2010) (abandonment where licensor both "lack[ed] [] an express contractual right to control quality" and failed to exercise any actual control over quality); *Dep't of Parks & Recreation v. Bazaar Del Mundo, Inc.*, 448 F.3d 1118, 1132 (9th Cir. 2006) ("no evidence revealing any effort to monitor or sample the quality of Bazaar del Mundo's food and service"); *Barcamerica*, 289 F.3d at 598 (trademark abandoned where holder licensed its wine brand to another vineyard but

Further, there is no authority substantiating McDonald's broader position that the Board's definition and determination of employer (or co-employer) status under the NLRA is somehow subordinated to purported requirements of federal trademark and franchising law. The courts do not afford that kind of special legal immunity to businesses that choose to trademark their goods, license their trademarks to others and/or enter into the kinds of voluntary contractual arrangements that trigger franchise regulation.[17] *See, e.g.*, *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 51-52 (9th Cir. 1971) (holding that a franchisor's "preservation of the distinctiveness, uniformity and quality of its product" cannot justify an otherwise illegal tying arrangement under Section 1 of the Sherman Act and noting that "[o]ne cannot immunize a tie-in from the antitrust laws by simply stamping a trade-mark symbol on the tied product"); *Butler v. McDonald's Corp.*, 110 F. Supp. 2d 62, 67-68 (D.R.I. 2000) (applying generally applicable vicarious liability principles notwithstanding franchise agreement disclaiming agency relationship); *Font v. Stanley Steamer Int'l, Inc.*, 849 So. 2d 1214, 1217 (Fla. Dist. Ct. App. 2003) (same). Thus, even if McDonald's were legally required to take certain actions in order to benefit from trademark or franchising law, or to comply with federal or state tax codes or a host of other laws regulating its business operations (which is not the case with respect to the joint employer evidence the General Counsel has elicited here), McDonald's cannot legitimately claim an exemption from

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"played no meaningful role in holding the wine to a standard of quality - good, bad, or otherwise," and, indeed, failed to make even the "minimal effort" of sampling a few bottles once a year); *Stanfield v. Osborne Indus., Inc.*, 52 F.3d 867, 871 (10th Cir. 1995) (trademark abandoned due to "[t]he absence of an express contractual right of control" and the fact that the licensor "had no contact whatsoever" with the licensee).

[17] Franchising is not itself a legal regime established or authorized by federal law. Rather, it is merely a voluntary, contractual business relationship that the Federal Trade Commission has chosen to regulate pursuant to its mission of preventing unfair methods of competition. *See* 15 U.S.C. § 45(a)(2) ("The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."). Specifically, the FTC's Franchise Rule, 16 CFR Part 436, protects "prospective purchasers of franchises," *i.e.*, "potential franchisees," by requiring franchisors to disclose "the material information [] need[ed] in order to weigh the risks and benefits of such an investment." *See* Franchise Rule Summary, https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/franchise-rule.

NLRA provisions.

Indeed, the expansive rationale underlying McDonald's position would mean that any branded and regulated business (*e.g.*, an automobile manufacturer or an airline) could argue that it was not really a statutory "employer" of its workers under applicable labor law because the employment terms and conditions it imposes are necessary to comply with other laws (*e.g.*, detailed safety and/or certification requirements under OSHA or FAA), or to maintain the quality of products and service associated with the well-known company brand (Ford or Delta). In short, even if the McDonald's System was mandated by trademark or franchising law—and again, it is not—there is simply no basis to conclude that other laws, including the NLRA, must yield to those statutory interests.

There are serious questions about McDonald's apparent claim that "brand protection," based on purported requirements of trademark and/or franchising law, trumps all other statutory requirements and legal doctrines. And that legal defense has serious implications well beyond the present setting. That theory would produce absurd and untenable results not only in the franchising context, and not only as to joint employer status, but in any case posing the question whether an employment relationship exists between a publicly "branded" business and the workers it employs, whenever the purported employer claims that the working conditions it imposes are required or intended to ensure that its products or services maintain the quality and reputation associated with its self-defined brand. A significant public interest supports the presentation of this test case for decision on its extensive and thoroughly litigated evidentiary record.

CONCLUSION

For all the foregoing reasons, as well as the grounds argued in our April 27 opening brief, the Charging Parties urge the Judge to reject the settlement agreements submitted by the Respondents and the General Counsel as Settlement Exhibits 1-30.

May 4, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kathy K. Krieger, affirm under penalty of perjury that on May 4, 2018, I caused a true and correct copy of the foregoing letter to Charging Parties' Reply in Opposition to Proposed Settlement Agreements to be filed electronically filed with the Division of Judges of the National Labor Relations Board and served on the same date via electronic mail at the following addresses:

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